RECORD AND BRIEFS.

Supreme Court, U.S.
FILED
DEC 20 2016
OFFICE OF THE CLERK

No. 16-399

IN THE

Supreme Court of the United States

ANTHONY W. PERRY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

REPLY TO BRIEF IN OPPOSITION

CHRISTOPHER LANDAU, P.C.
Counsel of Record
DEVIN S. ANDERSON
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

December 20, 2016

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 1

I. The Government's Efforts To Defend The Decision Below On The Merits Are Unavailing. 1

II. The Government's Efforts To Minimize The Importance Of This Case Are Unavailing 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Bell v. Hood,
327 U.S. 678 (1946) 3

Conforto v. MSPB,
713 F.3d 1111 (Fed. Cir. 2013) 6, 7, 8, 10, 11

Downey v. Runyon,
160 F.3d 139 (2d Cir. 1998) 7

Elgin v. Department of the Treasury,
132 S. Ct. 2126 (2012) 11

Glaude v. Postmaster General,
No. 14-4071, 2015 WL 136386
(N.D. Cal. Jan. 8, 2015),
aff'd, No. 15-15241, 2016 WL 4989972
(9th Cir. Sept. 19, 2016) 9

Grupo Dataflux v. Atlas Global Group, L.P.,
541 U.S. 567 (2004) 4

Harms v. IRS,
321 F.3d 1001 (10th Cir. 2003) 7

Kloeckner v. Solis,
133 S. Ct. 596 (2012) 1, 2, 5, 6, 7, 10

Kloeckner v. Solis,
639 F.3d 834 (8th Cir. 2011),
rev'd, 133 S. Ct. 596 (2012) 7

Lindahl v. Office of Personnel Mgmt.,
470 U.S. 768 (1985) 10, 11

Mid-Am. Waste Sys., Inc. v. City of Gary, Ind.,
49 F.3d 286 (7th Cir. 1995) 3

Reed Elsevier, Inc. v. Muchnick,
559 U.S. 154 (2010) 10

Shoaf v. Department of Agr.,
260 F.3d 1336 (Fed. Cir. 2001) 6

Stahl v. MSPB,
83 F.3d 409 (Fed. Cir. 1996) 5

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 3

Ukiah Adventist Hosp. v. FTC,
981 F.2d 543 (D.C. Cir. 1992) 9

Winns v. MSPB,
No. 15-2313, 2015 WL 6602518
(N.D. Cal. Oct. 30, 2015) 9

Statutes

5 U.S.C. § 7702(a) 5

5 U.S.C. § 7702(a)(1) 4

5 U.S.C. § 7702(a)(1)(A) 2, 3, 4, 5

5 U.S.C. § 7702(a)(1)(B) 2

5 U.S.C. § 7702(a)(2) 4

5 U.S.C. § 7702(e)(1) 4

5 U.S.C. § 7703(c) 6

Other Authorities

Brief for Respondent in Opposition,
Kloeckner v. Solis, 133 S. Ct. 596 (2012)
(No. 11-184), 2011 WL 6281813 ..... 1, 5, 6, 7, 10

Brief for Respondent,
Kloeckner v. Solis, 133 S. Ct. 596 (2012)
(No. 11-184), 2012 WL 2883261 ..... 1, 7, 10

S. Rep. No. 95-969 (1978) 6

INTRODUCTION

The Government's brief in opposition only confirms that this Court's review is warranted. Just five years ago, in *Kloeckner v. Solis*, 133 S. Ct. 596 (2012), the Government told this Court that a distinction between procedural and jurisdictional dismissals "has no basis" in the MSPB's judicial-review statute, is "difficult and unpredictable" to apply in practice, and "make[s] little sense." Br. for Resp. in Opp. at 15, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 6281813, at *15 (internal quotation omitted); Br. for Resp. at 25 n.3, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2012 WL 2883261, at *25 n.3. Now, in a stark about-face, the Government contends that this distinction is mandated by the statute, workable, and sensible. But the statute has not changed; only the Government's position has.

The Government nonetheless urges this Court to deny review by arguing that (1) the decision below is correct on the merits, *see* Opp. 7-14, and (2) the decision does not otherwise warrant this Court's review, *see id.* at 15-16. As explained below, the Government is wrong on both scores.

ARGUMENT

I. The Government's Efforts To Defend The Decision Below On The Merits Are Unavailing.

The Government argues that this case begins and ends with the statutory definition of a "mixed" case: one in which a federal employee or applicant (1) "has been affected by an action which the employee or applicant may appeal to the Merit Systems

Protection Board," and (2) "alleges that a basis for the action was discrimination prohibited by" certain enumerated civil-rights laws. 5 U.S.C. § 7702(a)(1)(A),(B), Pet. App. 93a. According to the Government, a case dismissed by the Board on jurisdictional (as opposed to procedural) grounds by definition is not "an action which the employee or applicant may appeal to the Merit Systems Protection Board," and thus does not qualify as a "mixed" case subject to review in federal district court. *See* Opp. 7-8.

That argument is manifestly incorrect. Just because the Board places a "jurisdictional" label on its dismissal of a claim does not mean that the Board lacked adjudicatory authority over that claim in the first instance. One could always say—accepting the conclusion as the premise—that a case could not be brought if it fails to satisfy all the elements of the cause of action. But that approach conflates jurisdiction with the merits. Conditioning the forum for judicial review on the Board's ultimate determination whether a claimant actually suffered an adverse employment action is just the sort of "hidden" or "roundabout way of bifurcating judicial review of the MSPB's rulings in mixed cases" that this Court rejected in *Kloeckner*. 133 S. Ct. at 605.

Here, there is no dispute that the Board had jurisdiction to resolve petitioner's claim that his settlement with the Census Bureau was involuntary, and that he was thus "affected by an action which [he] may appeal to the Merit Systems Protection Board." 5 U.S.C. § 7702(a)(1)(A), Pet. App. 93a. Indeed, the Board exercised jurisdiction over that claim not once but twice and rendered two decisions.

See Pet. App. 59-70a (first decision); Pet. App. 20-31a (second decision). The fact that the Board ultimately *rejected* petitioner's claim of involuntariness on the merits did not retroactively divest the Board of jurisdiction to render that decision. Because the Board indisputably had—and exercised—jurisdiction over this case, the suggestion that this is not a case that petitioner could "appeal to the Merit Systems Protection Board," 5 U.S.C. § 7702(a)(1)(A), Pet. App. 93a, is wholly insubstantial.

Nor is this some arcane principle of civil-service law. Rather, as explained in the petition, "it is black-letter law that an adjudicatory body does not lack jurisdiction to address a claim simply because the claim may fail on the merits." Pet. 15 (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946)); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). Ostensible federal questions fail on the merits every day in federal court, but "it is an old, old principle that the plaintiff's loss on the merits does not retroactively divest the court of jurisdiction." *Mid-Am. Waste Sys., Inc. v. City of Gary, Ind.*, 49 F.3d 286, 292 (7th Cir. 1995) (Easterbrook, J.).

Although petitioner made this straightforward point in his petition, *see* Pet. 15-16, the Government offers no response. Rather, the Government simply insists that "[w]here, as here, the Board has determined that it lacks jurisdiction because the underlying action is not one that is appealable to it, there is no valid foundation for treating the case as a mixed case for purposes of judicial review." Opp. 7-8. But that argument begs the question whether the action was appealable the Board in the first place. Here, it clearly was. As noted above, the

Government does not, and cannot, deny that petitioner was entitled to challenge the voluntariness of his settlement with the Census Bureau by "appeal to the Merit Systems Protection Board." 5 U.S.C. § 7702(a)(1)(A), Pet. App. 93a. Because petitioner could, and did, challenge the voluntariness of his settlement before the Board and alleged discrimination, this is a "mixed" case regardless of the Board's resolution of petitioner's challenge to the voluntariness of the settlement. *See Kloeckner*, 133 S. Ct. at 604.

Indeed, as petitioner pointed out, the statute would be incoherent if there were no way to determine whether a case is "mixed" unless and until the Board resolved the case on the merits. *See* Pet. 16. The statute requires the Board to resolve "mixed" cases within 120 days; if the Board fails to do so, the employee may then proceed directly to district court. *See* 5 U.S.C. § 7702(a)(1),(2), Pet. App. 93-94a; *id.* § 7702(e)(1), Pet. App. 94-95a. Needless to say, this regime requires a determination whether a case is "mixed" at the outset. That approach comports with the general rule that jurisdiction is established (or not) at the time of filing, and is unaffected by subsequent events. *See, e.g.*, *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570-71 (2004). "This time-of-filing rule is hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure." *Id.*

The Government insists, however, that a case can "presumptively" be treated as mixed (and thus subject to the 120-day rule) when an employee files an appeal with the Board, but can be reclassified as non-mixed if the Board "later determin[es] that the

allegation of appealability is incorrect and that it lacks jurisdiction." Opp. 14. But both the Board and the employee need to know at the outset whether the case is mixed, because the Board needs to know how quickly to rule, and the employee needs to know if he or she can proceed to district court after 120 days. Nothing in the statute contemplates a "presumptive" mixed claim that becomes a non-mixed claim (and retroactively alters the deadlines) if and when the Board ultimately rejects the claim on the merits.

In fact, if the Government is right here, then *Kloeckner* was wrongly decided. As the Government explained in that case, the determination whether a case is "mixed" has nothing to do with whether it is dismissed on "procedural" or "jurisdictional" grounds. An employee who violates the Board's procedural rules (for example, as in *Kloeckner*, by filing an untimely appeal) *also* "may [not] appeal to the Merit Systems Protection Board." 5 U.S.C. § 7702(a)(1)(A), Pet. App. 93a; *see also Stahl v. MSPB*, 83 F.3d 409, 412-13 (Fed. Cir. 1996). As the Government put it:

> The procedural-jurisdictional distinction rests on the premise that an appeal beyond the MSPB's jurisdiction "does not involve 'an action which the employee or applicant may appeal to the [Board]'" under Section 7702(a). *But that description applies equally to an appeal, like this one, that is not timely filed.*

Kloeckner Opp. at 15, 2011 WL 6281813, at *15 (emphasis added; citation omitted). Thus, although the appeal in *Kloeckner* was concededly untimely, this Court held that it was still a "mixed" case for purpose of the MSPB judicial-review statute because it was (1) "appealable to the MSPB," and (2) "alleged

discrimination prohibited by an enumerated federal law." 133 S. Ct. at 604. Whether the MSPB reaches the merits of a discrimination claim, or instead dismisses the case as untimely (whether on "procedural" or "jurisdictional" grounds) has nothing to do with the appropriate court for reviewing the MSPB's decision. *See Kloeckner* Opp. at 15, 2011 WL 6281813, at *15; *see also Conforto v. MSPB*, 713 F.3d 1111, 1124 (Fed. Cir. 2013) (Dyk, J., dissenting).

The Government's position here, as in *Kloeckner*, is thus "a contrivance, found nowhere in the statute's provisions on judicial review." 133 S. Ct. at 605. Indeed, that position defeats the whole point of bifurcating judicial review of MSPB decisions. Congress created an exception to the general rule that MSPB decisions are subject to judicial review in the Federal Circuit to protect federal employees' statutory "right" to *de novo* judicial review of their discrimination claims in district court. 5 U.S.C. § 7703(c), Pet. App. 99a; *see also* S. Rep. No. 95-969, at 63 (1978). That regime would make no sense if cases involving discrimination claims were routed to the Federal Circuit, where they would be subject to deferential review under the Administrative Procedure Act. *See, e.g., Shoaf v. Department of Agr.*, 260 F.3d 1336, 1340 (Fed. Cir. 2001); *Conforto*, 713 F.3d at 1127 (Dyk, J., dissenting). Thus, as this Court explained in *Kloeckner*, MSPB decisions in cases involving discrimination claims are subject to review in federal district court *regardless* of whether the Board reaches the merits of those claims. *See Kloeckner*, 133 S. Ct. at 603-04. That point was the beginning and the end of the analysis in *Kloeckner*, and should be the beginning and the end of the analysis here.

II. The Government's Efforts To Minimize The Importance Of This Case Are Unavailing.

Apart from the merits, the Government contends that "[f]urther review is unwarranted" because "[t]he decision below does not conflict with any decision of this Court or another court of appeals." Opp. 6; *see also id.* at 15-16. Again, the Government is wrong.

The decision below rests on an ostensible distinction between MSPB dismissals on "jurisdictional" grounds (reviewable in the Federal Circuit) and "procedural" grounds (reviewable in district court). *See* Pet. App. 5-15a; *see also Conforto*, 713 F.3d at 1118; *Harms v. IRS*, 321 F.3d 1001, 1008 (10th Cir. 2003); *Downey v. Runyon*, 160 F.3d 139, 146 (2d Cir. 1998). The Government, as noted above, expressly rejected that distinction in *Kloeckner*, arguing that it "has no basis" in the statute, is "difficult and unpredictable" to apply in practice, and "make[s] little sense." *Kloeckner* Opp. at 15, 2011 WL 6281813, at *15 (internal quotation omitted); *Kloeckner* Resp. Br. at 25 n.3, 2012 WL 2883261, at *25 n.3. In support of that argument, the Government relied on the Eighth Circuit's decision in *Kloeckner*, which also rejected that distinction as resting on "an unpersuasive textual analysis that would require courts to draw difficult and unpredictable distinctions." *Kloeckner v. Solis*, 639 F.3d 834, 838 (8th Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 596 (2012). Because nothing in this Court's *Kloeckner* ruling purported to disturb the Eighth Circuit's decision on this score, the Government's assertion that "[i]t is unclear what precedential weight a future Eighth Circuit panel

would attach to that decision," Opp. 15, can only be characterized as wishful thinking.

But even if there were no circuit conflict on the validity of the procedural-jurisdictional distinction, this case would warrant this Court's review. This Court does not await a circuit conflict on matters within the Federal Circuit's exclusive jurisdiction, because by definition such a conflict cannot arise except insofar as a litigant files in another court and that court refuses to transfer the case to the Federal Circuit. Here, the Federal Circuit has squarely held that MSPB cases alleging discrimination but dismissed on "jurisdictional" grounds fall within its exclusive jurisdiction. *See Conforto*, 713 F.3d at 1115-21. The MSPB thus directs the claimants in such cases—many, if not most, of whom proceed *pro se*—to seek review in the Federal Circuit. *See* Pet. App. 30a ("You have the right to request review of this final decision *by the United States Court of Appeals for the Federal Circuit.*") (emphasis added). Because the MSPB is affirmatively channeling these cases to the Federal Circuit, the normal process through which a circuit conflict might be expected to develop has been thwarted.

Not to worry, says the Government: some claimants may ignore the MSPB's directive and file in district court, and "[s]hould a claimant do so, the question presented here could potentially be addressed by the regional circuit on appeal." Opp. 15-16. That argument is disingenuous at best. Claimants should not be expected to disregard the MSPB's directives, and courts should not be expected to look kindly on any such disregard. *See, e.g.*, *Glaude v. Postmaster General*, No. 14-4071, 2015 WL

136386, at *3 (N.D. Cal. Jan. 8, 2015) (dismissing *pro se* case filed in district court rather than the Federal Circuit, and chastising the claimant for ignoring the MSPB's directive to pursue review in the Federal Circuit), *aff'd*, No. 15-15241, 2016 WL 4989972 (9th Cir. Sept. 19, 2016). To ask claimants—especially *pro se* claimants—to fight the Government on the jurisdictional issue, as opposed to accepting transfer to the Federal Circuit, is to ask them to play Russian roulette with their claims. And if a district court transfers a case to the Federal Circuit, *see, e.g.*, *Winns v. MSPB*, No. 15-2313, 2015 WL 6602518, at *6 (N.D. Cal. Oct. 30, 2015), a claimant could obtain review in the regional circuit only by seeking an extraordinary writ of mandamus, *see, e.g.*, *Ukiah Adventist Hosp. v. FTC*, 981 F.2d 543, 548-51 (D.C. Cir. 1992)—again, an unreasonable and unrealistic burden.

Indeed, the Government does not believe its own argument that, absent review here, the issue is likely to percolate in other courts. To the contrary, the Government seeks to downplay the "'practical difficulties'" presented by the procedure/jurisdiction distinction by emphasizing that cases dismissed by the MSPB on jurisdictional grounds are likely to end up in the Federal Circuit. Opp. 14 (quoting Pet. 17). Thus, the Government stresses that the MSPB directs claimants in such cases to "seek judicial review in the Federal Circuit," and "where an employee mistakenly files in the wrong court, that court will have the ability to transfer the case" to the Federal Circuit. *Id.* The Government thereby underscores petitioner's point that the ordinary process of percolation that tends to give rise to circuit

conflicts will not operate here because these cases are being routed to the Federal Circuit.

Nor is it any answer for the Government to say that "the claimant could seek review of the question presented in this Court following a final decision from the Federal Circuit." Opp. 16. The Federal Circuit has squarely addressed the precise issue presented here, *see Conforto*, 713 F.3d at 1115-21, and there is no reason to suppose that it will reverse course. Accordingly, if a claimant sought this Court's review of a future Federal Circuit decision applying the *Conforto* rule, the Government can be expected to oppose review there for the same reasons that it opposes review here.

And the brief in opposition fails to provide any principled basis for distinguishing "procedural" from "jurisdictional" MSPB dismissals. If, as the Government asserted in *Kloeckner*, that distinction is "difficult and unpredictable" to apply, and "make[s] little sense," that is as true today as five years ago. *Kloeckner* Opp. at 15, 2011 WL 6281813, at *15 (internal quotation omitted); *Kloeckner* Resp. Br. at 25 n.3, 2012 WL 2883261, at *25 n.3. If the Government cannot articulate a principled distinction between "procedural" and "jurisdictional" dismissals, it is unrealistic and unfair to expect claimants, many if not most of whom proceed *pro se*, to apply any such distinction to determine where to seek judicial review of adverse MSPB decisions. *See, e.g., Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) ("[T]he distinction between jurisdictional conditions and claim-processing rules can be confusing in practice."); *Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 799 (1985) (noting

the "bizarre jurisdictional patchwork" that would result if the forum for judicial review of Board decisions turned on "whether an employee's retirement was voluntary or involuntary, and accordingly ... whether the appeal might properly be characterized as an adverse action"); *Conforto*, 713 F.3d at 1124-25 (Dyk, J. dissenting).

At bottom, the Government cannot deny that this case presents a unique vehicle for this Court to address this issue: petitioner mistakenly filed this case in the D.C. Circuit, instead of either the Federal Circuit or a district court, and that court appointed counsel to address the jurisdictional issue rather than summarily dismissing or transferring the case. The legal arguments on both sides have been extensively fleshed out, and there is no reason to delay review.

To the contrary, there is every reason for this Court to resolve this recurring issue for once and for all. The Federal Government is the Nation's largest employer, so the question "whether the United States Court of Appeals for the Federal Circuit" or a "United States district court" has jurisdiction to review MSPB decisions involving discrimination claims is of "substantial importance." *Lindahl*, 470 U.S. at 771; *see also Elgin v. Department of the Treasury*, 132 S. Ct. 2126, 2135 (2012) (emphasizing the need for "clear guidance about the proper forum for the employee's claims at the outset of the case"). Unless and until this Court grants review, the Federal Circuit has effectively deprived federal employees of their right to *de novo* review of discrimination claims in federal district court, and

turned the bifurcated system of judicial review established by Congress on its head.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, this Court should grant review.

December 20, 2016

Respectfully submitted,

CHRISTOPHER LANDAU, P.C.
Counsel of Record
DEVIN S. ANDERSON
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com